

RECORD NO.

14-1381

In The
United States Court of Appeals
For The Second Circuit

SENSATIONAL SMILES, LLC, DBA Smile Bright,
Plaintiff – Appellant,

LISA MARTINEZ,
Plaintiff,

v.

JEWEL MULLEN, DR., in her official capacity as Commissioner of Public Health, JEANNE P. STRATHEARN, DDS, in her official capacity as a Member of the Connecticut Dental Commission, ELLIOT S. BERMAN, DDS, in his official capacity as a Member of the Connecticut Dental Commission, LANCE E. BANWELL, DDS, in his official capacity as a Member of the Connecticut Dental Commission, PETER S. KATZ, DMD, in his official capacity as a Member of the Connecticut Dental Commission, STEVEN G. REISS, DDS, in his official capacity as a Member of the Connecticut Dental Commission, MARTIN UNGAR, DMD, in his official capacity as a Member of the Connecticut Dental Commission, BARBARA B. ULRICH, in her official capacity as a Member of the Connecticut Dental Commission,
Defendants – Appellees.

**ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF CONNECTICUT AT NEW HAVEN**

**APPENDIX
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**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF CONNECTICUT**

SENSATIONAL SMILES LLC,
D/B/A SMILE BRIGHT,

Plaintiff,

Civil Action No.
3:11-CV-01787-MPS

v.

Date: April 8, 2013

DR. JEWEL MULLEN, ET AL.,

Defendants.

**DECLARATION OF STEPHEN BARRACO IN SUPPORT OF
PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT**

I, Stephen Barraco, declare under penalty of perjury that the following is true:

1. I am a citizen of the United States, a resident of the State of Connecticut, and over the age of 18 years. I make this declaration in support of Plaintiff's Motion for Summary Judgment; it is based on my personal knowledge of the facts stated herein.

Smile Bright and Its Whitening Services

2. Sensational Smiles LLC d/b/a Smile Bright is a Connecticut limited-liability corporation that I formed in 2007 along with my partner Tasos Kariofyllis to offer peroxide-based teeth-whitening services in Connecticut.

3. My partner and I are not licensed dentists and we are not eligible to become licensed dentists. Additionally, Smile Bright is not licensed as a professional-services corporation as required under Chapter 594a of the Connecticut Statutes for corporations that offer services that constitute the practice of dentistry, and it is not eligible to become licensed.

4. We have offered teeth-whitening services at home shows, in shopping malls, and in salons. Regardless of the location, however, the whitening process was the same.

5. A complete description of the whitening process that we previously offered is given below. A video that accurately demonstrates the process is also available at http://www.youtube.com/watch?v=IjZ_8qbzsGI.

6. Our services would begin with an explanation of the product we sold and the process of teeth whitening.

7. We would ask customers to review and sign an information sheet indicating that they would follow all of the instructions supplied with the product and affirming that they didn't have any condition that would contraindicate whitening, such as difficulty breathing comfortably through their nose during the 20-minute procedure, gum disease, or a recent oral piercing or surgery. An accurate copy of that sheet is attached to this declaration as Exhibit 1.

8. We told customers that not all causes of tooth discoloration will respond to peroxide-based whitening and that they should only whiten their teeth if they have healthy teeth, but our employees never attempted to diagnose the underlying cause of any tooth discoloration or whether a customer's teeth were actually healthy.

9. We did not offer teeth whitening services to minors or to women who indicated that they were nursing or pregnant. We did not have any scientific reason for thinking that teeth whitening is dangerous for these people, we just wanted to be cautious.

10. After the customer reviewed the form and consented to the whitening process, we invited them to sit in a reclining chair like those used in salons.

11. Next, an employee would measure the color of the customer's teeth using a shade guide. A shade guide is a device that holds a row of artificial teeth of varying shades, arranged from lightest to darkest.

12. To measure the shade of the customer's teeth, the employee would compare the color of the customer's teeth to the shade guide and select the shade that was closest to the customer's

natural shade. This comparison was purely visual and the employee made no effort to diagnose the cause of any tooth discoloration the customer might have.

13. Using a handheld mirror, the customer was also allowed to look at the shade guide, so that the customer could decide for herself whether the employee had accurately judged the shade of the customer's teeth. The purpose of using the shade guide was so that the customer could evaluate the results of the whitening process and see how much whiter their teeth had become.

14. Next, one of our employees would put on disposable gloves and hand the customer a pre-packaged "brush up," which is a disposable tooth-cleaner that fits over the index finger like the finger of a glove. The employee would instruct the customer to open the brush up, slide it over her finger, and gently rub the surface of her visible teeth to ensure that they were free of any debris before the whitening.

15. Then the employee would open a prepackaged teeth-whitening mouth tray containing a 30% carbamide-peroxide gel. These trays were one-size-fits-all, and they were always disposed of immediately after use.

16. The employee would inspect the tray to ensure that it had shipped with whitening gel in it and that the gel was evenly distributed across the tray. If the tray did not have sufficient gel, the employee would add gel to the tray from a sterile, disposable, prepackaged plastic syringe.

17. If the gel had settled unevenly during transport, the employee would use a disposable wooden stick, similar to a tongue depressor, to spread the gel evenly across the tray. The employee would then place the tray into a disposable plastic bowl and hand it to the customer.

18. After handing the tray to the customer, the employee would instruct the customer to insert the tray into her mouth and to wiggle the tray slightly to ensure that the gel was evenly distributed over the surface of her teeth. The employee would give the customer a pair of tinted glasses then activate a blue LED light and position it in front of the customer's mouth.

19. After 20 minutes the light would automatically shut off. The employee would ask the customer to remove the tray and place it back into the disposable plastic bowl. The employee would then hand the customer a small cup of water so that the customer could rinse her mouth. After rinsing, the customer would spit the water into the disposable plastic bowl and hand it to the employee, who would throw out the bowl. Finally, the employee and the customer would use the shade guide to measure the change in the color of the customer's teeth.

20. After each customer, a Smile Bright employee would disinfect the glasses, chair, and light.

21. Each time an employee would leave the customer and return, or go to work with a new customer, the employee would put on new, clean gloves.

22. At no time during the whitening procedure would our employee put their hands, or anything else, into the customer's mouth. The application of the teeth-whitening product itself was performed entirely by the customer, just as they would at home.

Effect of Declaratory Ruling on Smile Bright

23. In 2009, Smile Bright was a thriving small business. We had locations in two shopping malls and one salon, and we had been featured repeatedly on local television news.

24. At that time we were not only looking at renewing the leases for our two shopping mall locations, we had begun negotiations to open in a third mall.

25. Then we heard that the Dental Commission was considering issuing a declaratory ruling on teeth whitening. We had seen the results of similar efforts in other states, where teeth-whitening entrepreneurs like us had been forced out of business, and we did not want to renew our leases or expand our business if the Dental Commission was going to make it illegal.

26. We prepared for the worst, and wound up our businesses at the West Farms and Enfield Square shopping malls. We had to let four employees go.

27. Up to that point, we had served hundreds of customers at our mall locations, averaging approximately 125 to 150 customers per week. Not one of these customers was ever injured by our teeth-whitening services.

28. We kept offering teeth whitening at our salon location, because we did not have to enter into a long-term lease with them and because we hoped we might be able to keep operating there after the declaratory ruling.

29. Once the declaratory ruling came down, we knew that we could not continue to operate as we had before. The ruling named several of the things we did as now being the practice of dentistry, including “making recommendations of how to perform teeth whitening,” “utilizing instruments and apparatus such as enhancing lights,” “advising individuals on the use of trays,” and “instructing a customer on teeth whitening procedures or methods.”

30. We knew that the penalties for the unlicensed practice of dentistry could be quite severe. We did not want to run the risk of fines or jail time, so we stopped offering teeth-whitening services entirely.

31. Our business is currently limited to selling teeth-whitening products for home use over the Internet. These are the same products we used to sell in our mall and salon locations.

32. If it we were allowed to, we would immediately resume offering teeth-whitening services and begin searching out retail space in shopping malls for new locations. However, neither us have any intention of spending years of our lives and tens of thousands of dollars taking the steps necessary to become licensed dentists.

33. We think that the Dental Commission shut down non-dentist teeth whitening because they do not want the competition. We charged between \$75 and \$100, depending on what specials we were offering, which is much less than what most dentists charge.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on April 8, 2013.



Stephen Barraco

Declaration of Stephen Barraco in Support of Plaintiff's Motion for Summary Judgment

EXHIBIT 1



I understand and agree to follow all instructions as supplied with the product. I also agree not to use this product under the following circumstances.

- If I cannot breath comfortably through my nose for 20 minutes.
- If I have or have a suspicion of gum disease. (inflammation, bleeding or soreness around the gums)
- If I have had or will have oral surgery/extractions within 28 days of treatment.
- If I am allergic to peroxide, glycerin or other ingredients contained in this product.
- If I have received a piercing in the oral cavity within the last 28 days.
- If I am younger than 16 years old.
- If I am pregnant or breast feeding.
- If I am in good standing with my dentist

I understand and agree that receiving this product with any type of dental Fillings, Crowns/Caps, Veneers, and bonding, etc. is at my own risk. I agree to hold Smile Bright and its affiliates harmless. The self-administered product does not affect the above items that should be in good standing order.

Cosmetic teeth whitening post product instructions. Recommended for the first 24 hours after use to achieve maximum results:

- Avoid the consumption of any food types that contains strong coloring such as Curry, Beetroot and Black Currants.
- The use of any tobacco products.
- Avoid consuming any drinks with dark coloring such as red wine, beer, or colored carbonated soft drinks etc.
- I will observe my normal tooth brushing regimen

Name: _____ Age: _____

Address: _____ City _____ State _____ Zip code _____

E-mail (For internal use only): _____

Phone: _____

How Did You Hear About Us? : Friend _____ Walk-in _____ Radio _____ TV _____ Internet _____ Other _____

I have read and understand all pre- product warnings, aftercare recommendations. I understand that Smile Bright is an over the counter (OTC) product and Whitening results vary depending on your teeth; results vary anywhere from 2 to 12 shades after whitening. I understand that I will be self administering that mouth tray and the Aesthetic Professional is only there as a guide

Signature: _____ Date: _____

-----Shade Guide Information (For Internal Use Only) -----

Shade guide prior to whitening: _____ Shade guide after whitening: _____

Total number of shade improvements after process: _____

Aesthetic Professional: _____ Date: _____

1/3/2013

Barraco, Stephen

UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

Civil Action No. 3:11-cv-01787

LISA MARTINEZ AND SENSATIONAL
SMILES, LLC D/B/A SMILE
BRIGHT

VS.

DR. JEWEL MULLEN, ET AL.

ORIGINAL

DEPOSITION OF: STEPHEN BARRACO

DATE: January 3, 2013

HELD AT: Assistant Attorney General Office
55 Elm Street
P.O. Box 120
Hartford, CT 06141-0120

Reporter: Aretha S. Martin, LSR
BRANDON SMITH REPORTING SERVICE
249 Pearl Street
Hartford, Connecticut 06103
(800) 852-4589

1/3/2013

Barraco, Stephen

1 that we would back out, uh, because if that came down,
2 we would be locked into overhead that we obviously
3 couldn't afford, because we could not sell products.

4 Q Okay. And when did you became aware that there
5 was discussion -- what is your understanding of when the
6 declaratory ruling process started?

7 A Some time within that year we were open.

8 Q Okay.

9 A We had gotten wind that there was being
10 discussions that cosmetic teeth whitening was going to
11 be banned in this state.

12 Q And did you ever ask to participate in the
13 declaratory ruling process?

14 A We did attend a few dental board meetings.

15 Q Okay.

16 A The two that we did attend, it was supposed to be
17 discussed, uh, and after three hours of, you know,
18 whatever they were discussing, they had kept postponing
19 that discussion.

20 Q Okay. And when you -- when the declaratory
21 ruling process, the formal declaratory ruling process,
22 started, did you ask to participate?

23 A I was not made aware of when the actual ruling
24 was going down, and so I did not have the opportunity to
25 voice my opinion.

1/3/2013

Barraco, Stephen

1 Q Okay. Did you ask anyone at the Department of
2 Public Health to keep you abreast of when there would be
3 a declaratory ruling or make any written requests to the
4 department?

5 A No.

6 Q And you are sure that the salon in North Haven
7 you were taking appointments and selling the product at
8 the time that the declaratory ruling was issued in 2011?

9 A When I was notified of it, I was -- I had stopped
10 operating.

11 Q You had already stopped operating?

12 A No, I stopped operating.

13 Q When?

14 A When I was notified of the ruling.

15 Q Who notified you of the ruling?

16 A My attorney.

17 Q And when did you retain your attorney?

18 A After the ruling.

19 Q And so how did he notify you of the ruling?

20 MR. SHERMAN: Objection to the extent that
21 this calls for attorney-client privilege.

22 MR. SHAPIRO: I don't think it calls for
23 attorney-client privilege. I am asking him a timeline.

24 MR. SHERMAN: You can answer about when I
25 started to talk to you.

1/3/2013

Barraco, Stephen

1 Q Okay. And so within seven to ten days you
2 received a copy of it?

3 A Yes.

4 Q And during the process of the declaratory ruling,
5 which, if you will just take my word for it, was in
6 September of 2010, uh, is when dental commission
7 initiated the declaratory ruling proceeding, were you
8 aware of that?

9 A Aware of the exact date or....

10 Q Were you aware that the dental commission took an
11 action that started the declaratory ruling process that
12 was going to result in a decision?

13 A I had heard that there were things going on.

14 Q What did you hear?

15 A That the dental board was trying to stop cosmetic
16 teeth whitening.

17 Q Okay. And did you hear that they were doing a
18 declaratory ruling proceeding? That they were going to
19 conduct a proceeding?

20 A Yes.

21 Q And when did you hear that?

22 A I don't remember the exact time.

23 Q Do you remember approximately the time?

24 A I attended dental board meetings, in some time --
25 or during '09.

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF CONNECTICUT**

SENSATIONAL SMILES LLC,
D/B/A SMILE BRIGHT,

Plaintiff,

Civil Action No.
3:11-CV-01787-MPS

v.

Date: June 13, 2013

DR. JEWEL MULLEN, ET AL.,

Defendants.

**DECLARATION OF PAUL SHERMAN IN SUPPORT OF
PLAINTIFF'S REPLY IN SUPPORT OF
PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT**

I, Paul Sherman, declare under penalty of perjury that the following is true:

1. I am a citizen of the United States, a resident of the Commonwealth of Virginia, and over the age of 18 years. I make this declaration in support of Plaintiff's Reply in Support of Plaintiff's Motion for Summary Judgment; it is based on my personal knowledge of the facts stated herein.

2. Attached as Exhibit 14 to this declaration is a true and correct copy of the transcript of the 30(b)(6) deposition of the Connecticut Dental Commission.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on June 13, 2013.


Paul Sherman

Declaration of Paul Sherman in Support of
Plaintiff's Reply in Support of Plaintiff's
Motion for Summary Judgment

EXHIBIT 14

1 IN THE UNITED STATES DISTRICT COURT
2 FOR THE DISTRICT OF CONNECTICUT

3
4 Civil Action No.: 3:11-CV-01787-WWE

5 - - - - -
6 SENSATIONAL SMILES, LLC, d/b/a SMILE BRIGHT,
7 Plaintiff,

8 vs.

9 DR. JEWEL MULLEN, ET AL,
10 Defendants.

11 - - - - -

12
13 30(b)(6) DEPOSITION OF THE
14 DEPARTMENT OF PUBLIC HEALTH

15 By: JEANNE STRATHEARN

16 January 4, 2013
17
18
19
20
21
22
23
24
25

1 A p p e a r a n c e s:

2 For the Plaintiff:

3 INSTITUTE FOR JUSTICE
4 901 North Glebe Road, Suite 900
5 Arlington, Virginia 22203-1854
6 (703) 682-9320

7 By: PAUL M. SHERMAN, ESQ.
8 psherman@ij.org
9

10 For the Defendants and the Witness:

11 STATE OF CONNECTICUT
12 OFFICE OF THE ATTORNEY GENERAL
13 55 Elm Street
14 P.O. Box 120
15 Hartford, Connecticut 06141-0120
16 (860) 808-5210

17 By; DANIEL SHAPIRO, ESQ.
18 daniel.shapiro@ct.gov
19
20
21
22
23
24
25

1 ...The following is the
2 30(b)(6) Deposition of the Department of
3 Public Health by: JEANNE STRATHEARN,
4 Chairperson, Connecticut State Dental
5 Association, 835 West Queen Street,
6 Southington, Connecticut 06489, pending in
7 the United States District Court, for the
8 District of Connecticut, pursuant to Notice
9 and the Federal Rules of Civil Procedure,
10 before Jill K. Ruggieri, C.R.R., R.M.R.,
11 L.S.R. 506, a Notary Public duly commissioned
12 and qualified, at the offices of United
13 Reporters, Inc., 90 Brainard Road, Suite 103,
14 Hartford, Connecticut, on January 4, 2013, at
15 9:32 a.m., at which time counsel appeared as
16 hereinbefore set forth...

17 STIPULATION

18 The deposition may be signed
19 before any Notary Public.
20
21
22
23
24
25

1 J E A N N E S T R A T H E A R N,
2 called as a witness, being first duly
3 sworn by Jill K. Ruggieri, C.R.R.,
4 R.M.R., L.S.R. 506, a Notary Public duly
5 commissioned and qualified, was examined
6 and testified on her oath as follows:

7 DIRECT EXAMINATION

8 BY MR. SHERMAN:

9 Q. Good morning.

10 A. Good morning.

11 Q. My name is Paul Sherman. I
12 represent the Plaintiffs in this lawsuit.

13 Could you please state your name
14 and your title for the record.

15 A. I'm Jeanne Strathearn. I'm a
16 general dentist, and I'm the chairperson for
17 the Connecticut State Dental Commission.

18 Q. Okay. Have you ever had your
19 deposition taken before?

20 A. No.

21 Q. Okay. Well, there's nothing to it.
22 All there is to it is, I will ask questions
23 and you have to provide truthful answers.
24 And my job is to ask clear, understandable
25 questions, so if I ask any question that you

1 don't understand or that doesn't make sense
2 to you, just let me know, and I'll try to ask
3 the question in a way that makes sense.

4 If you need a break at any time,
5 feel free to ask. I would just ask that, if
6 there's a question pending, you answer the
7 question, and then we can take a break. If
8 you need water or coffee or anything like
9 that, just let me know.

10 Is there any reason why you
11 wouldn't be able to testify truthfully today?

12 A. No.

13 Q. I didn't think so.

14 MR. SHAPIRO: Just so the
15 record is clear, I'm Daniel Shapiro from the
16 Attorney General's Office, and I'm
17 representing the Dental Commission.

18 MR. SHERMAN: All right. Why
19 don't we just mark this as Exhibit 1.

20 (Plaintiff's Exhibit 1:
21 Marked for identification - described in
22 index.)

23 BY MR. SHERMAN:

24 Q. So we've marked as Exhibit 1 the
25 notice of deposition that I sent to Attorney

1 Shapiro in this case.

2 Have you seen this document before?

3 A. Yes.

4 Q. You're aware that you've been
5 chosen by Attorney Shapiro to represent the
6 Dental Commission as a witness?

7 A. I -- I'm speaking as a person and a
8 member of the Commission. I can't speak for
9 the entire Commission.

10 Q. Okay. Well, could you do me a
11 favor? If you look at the bottom of the
12 first page and then through to the second
13 page, you'll see that there's a list of nine
14 different subject areas.

15 Would you mind reading through
16 those just silently to yourself?

17 A. (Witness complies.)

18 Q. Do you have experience with the
19 matters that are set forth in those nine
20 numbered paragraphs?

21 A. I do have experience.

22 Q. Okay. Do you feel qualified to
23 talk about those areas?

24 A. About some of the areas.

25 Q. Okay. Are there particular areas

1 that you don't feel qualified to talk about?

2 A. Yes.

3 Q. Okay. Could you indicate which
4 ones those are?

5 A. (Deponent reads document.)

6 The Commission doesn't receive
7 complaints.

8 Q. Okay. So one of the things -- I
9 may have some personal confusion about the
10 various roles of the commission and the
11 Department of Health. So at any point I ask
12 you a question where that's what the
13 Department of Health does, just let me know.

14 A. Okay. The complaints are received
15 by the Department of Public Health.

16 Q. Okay.

17 MR. SHAPIRO: I'm not sure
18 what you're asking the witness to do right
19 now in terms of -- do you have questions
20 about these individual areas? I mean, is she
21 supposed to make a declaration about these
22 areas in terms of what --

23 MR. SHERMAN: Well, I -- I
24 want to -- I mean, this is a 30(b)(6)
25 deposition.

1 MR. SHAPIRO: Yes.

2 MR. SHERMAN: I was required
3 to inform you what areas I want to explore
4 with a representative of the Dental
5 Commission. I want to make sure that she
6 will be able to explore these areas.

7 A. The commission doesn't establish
8 the requirements for licensure in Connecticut
9 as a dentist or a dental hygienist.

10 BY MR. SHERMAN:

11 Q. Okay. All right.

12 Well, why don't we -- we'll get
13 into the questions, and if stuff comes up
14 that's not the Commission's role, it's the
15 Department of Health's role, we'll just note
16 that at each step as we go through.

17 What did you do to prepare for this
18 deposition?

19 A. I met with Attorney Shapiro for 50
20 minutes on Wednesday, January 3rd --
21 January 2nd.

22 Q. I think it's January 2nd.

23 A. Today's the 4th.

24 Q. Okay. Did you talk with anyone
25 other than Attorney Shapiro?

1 A. No.

2 Q. Okay. Did you review any documents
3 to prepare for today's deposition?

4 A. I reviewed the declaratory ruling.

5 Q. Okay. No other documents?

6 A. I read this document.

7 Q. Anything else?

8 A. No.

9 Q. Could you describe your educational
10 background, please?

11 A. I went to dental hygiene school,
12 and then I went to dental school.

13 Q. What degree in dentistry do you
14 have?

15 A. DDS.

16 Q. What's the difference between a DDS
17 and a DMD?

18 A. There's no difference. It depends
19 on the school you go to.

20 Q. Law schools do the same thing.
21 Some have JDs and some have, I think, LLBs.
22 When did you graduate from dental
23 school?

24 A. 1986.

25 Q. And you've been practicing as a

1 dentist since then?

2 A. Yes.

3 Q. Okay. How long was your course of
4 study in dentistry?

5 A. Four years.

6 Q. Okay. Is that typical?

7 A. I believe so.

8 Q. How long have you served on the
9 Dental Commission?

10 A. Since the year 2000.

11 Q. And you're currently the chair of
12 the Dental Commission?

13 A. Yes.

14 Q. And how long have you served as
15 chair?

16 A. Since March of 2007.

17 Q. How were you selected to be on the
18 commission?

19 A. I don't know.

20 Q. Is the commission a full-time job,
21 serving on the commission a full-time job?

22 A. I'm not sure what you mean as --
23 when you say it's a full-time job.

24 Q. Okay. Are you paid for serving on
25 the commission?

1 A. No.

2 Q. Okay. What responsibilities make
3 up your current job at the commission?

4 A. We are entrusted with assuring
5 compliance of the statutes regarding
6 dentistry.

7 Q. How does the commission go about
8 doing that?

9 A. We -- two ways, by the current
10 statutes and by declaratory rulings.

11 Q. Does the commission have employees
12 other than the commissioners themselves?

13 A. There are no employees.

14 Q. So is the commission just literally
15 the commissioners?

16 A. Yes.

17 Q. You said a moment ago that the
18 Commission assures compliance with the
19 current statutes. How does it assure
20 compliance with the current statutes?

21 A. On a case-by-case basis.

22 Q. Does the Commission conduct
23 investigations as to whether people have
24 violated the statutes?

25 A. The Commission does not conduct

1 investigations.

2 Q. Okay. Does the Department of
3 Health?

4 A. Yes.

5 Q. Does the commission assess fines or
6 penalties against violaters?

7 A. No.

8 Q. That's also the Department of
9 Health?

10 A. Yes.

11 Q. What role does the commission play
12 in assuring compliance?

13 A. It provides advice and consent to
14 the Department of Public Health.

15 Q. Does the commission help guide the
16 department in the interpretation of the
17 statutes?

18 MR. SHAPIRO: Can you say the
19 question again?

20 MR. SHERMAN: Sure.

21 BY MR. SHERMAN:

22 Q. Does the commission help to guide
23 the Department in interpreting the statutes?

24 A. I think the statutes speak for
25 themselves.

1 Q. Okay. What I'm trying to get a
2 handle on is what -- what role the commission
3 plays, what -- what does the commission do?

4 A. The commission provides advice and
5 consent --

6 Q. Okay.

7 A. -- to the Department of Public
8 Health.

9 Q. What kind of advice?

10 A. The department may bring something
11 to the commission after an investigation with
12 an order associated with it.

13 Q. Yes.

14 A. The commission will provide advice
15 and consent regarding the order.

16 Q. Okay. Can you give me an example
17 of the time that this has happened and sort
18 of the way it plays out? I just want to
19 understand the process.

20 A. If a dentist has been -- if a
21 complaint has been filed to the department of
22 Public Health against a dentist for perhaps
23 prescribing narcotics in a way that shouldn't
24 have been prescribed, the department will
25 investigate and have meetings with the

1 dentist and the dentist's -- and the
2 associated structure for the investigation,
3 and the Department will propose a remedy and
4 bring that remedy to the Dental Commission.

5 Q. Okay.

6 A. And the Dental Commission may vote
7 in favor of it or -- or may not.

8 Q. What happens if the Dental
9 Commission votes against the proposed remedy?

10 A. The Department will decide how to
11 proceed.

12 Q. Okay. So that's the -- the
13 Department can ignore the Dental Commission's
14 vote?

15 A. The Department can ignore the
16 Dental Commission's vote.

17 Q. Are you aware of times when that
18 has occurred or does --

19 A. No.

20 Q. So the Department -- the typical
21 practice is they follow your vote?

22 A. Yes.

23 Q. Does the commission promulgate
24 regulations related to dentistry?

25 A. No.

1 Q. That's the Department?

2 A. Yes.

3 Q. A while back you mentioned that the
4 other way that the commission assures
5 compliance with statutes is through
6 declaratory rulings. What is a declaratory
7 ruling?

8 A. If you refer back -- can you
9 rephrase the beginning of your question?

10 Q. Sure. So earlier we were talking
11 about the roles of the commission, and you
12 said that the commission assures compliance
13 with the statutes, and you said that there
14 are two ways you do that, and I believe you
15 said you assure compliance with the current
16 statutes and you issue declaratory rulings.

17 So I'd like to talk about
18 declaratory rulings. First off, what is a
19 declaratory ruling?

20 A. A declaratory ruling is a -- an
21 issuance of -- of a decision based on a
22 question brought.

23 Q. A question brought by whom?

24 A. It could be any numbers of parties.

25 Q. So it doesn't have to come from the

1 Department of Public Health? It could come
2 from a private citizen?

3 A. I'm not sure I'm clear on the
4 question.

5 Q. Okay.

6 MR. SHAPIRO: Let me just
7 object to the question in the sense that the
8 answer to the question is provided in the
9 statutes, that there's no independent duty of
10 the commission to have a say in that issue,
11 meaning the answer to who can bring a
12 declaratory ruling or what a declaratory
13 ruling is in the Connecticut General Statute.

14 MR. SHERMAN: Okay.

15 BY MR. SHERMAN:

16 Q. Can you walk me through the
17 declaratory ruling process?

18 A. This particular declaratory ruling
19 process?

20 Q. First just in general?

21 A. The Commission may decide to go
22 forward and issue a declaratory ruling, and
23 there are certain procedures which must be
24 followed. And with the help of our attorney
25 liaison, we follow the steps by issuing

1 notice and asking interested parties and
2 providing notice to interested parties and
3 then asking for testimony and posting.

4 And I can't tell you all the times,
5 but there's a certain procedure that was
6 followed -- that is followed, and the
7 declaratory ruling is held properly, and then
8 there are findings of fact, and then there is
9 a issuance of the declaratory ruling.

10 Q. Does the commission play any role
11 in determining whether someone is qualified
12 for licensure as a dentist in Connecticut?

13 A. No.

14 Q. Okay.

15 A. Excuse me. You are speaking of
16 initial licensure?

17 Q. Correct.

18 A. Yes.

19 Q. Had the Dental Commission taken any
20 public stance on teeth whitening before it
21 issued it's declaratory ruling in June of
22 2011?

23 MR. SHAPIRO: I'm going to
24 object. It's vague in terms of what the word
25 "stance" means.

1 BY MR. SHERMAN:

2 Q. You can answer the question if you
3 understand it.

4 A. I don't believe so.

5 Q. I saw a suggestion in one of the
6 documents produced by Attorney Shapiro that
7 the commission, during a meeting in June 2008
8 stated that teeth-whitening systems should
9 only be used by dentists. Do you know if
10 that's correct?

11 A. I don't remember.

12 Q. Had teeth whitening by non-dentists
13 been a subject of discussion at the
14 commission meetings?

15 A. No.

16 Q. Okay. It obviously became a
17 subject of discussion at some point?

18 A. Yes.

19 Q. Because you have the declaratory
20 ruling?

21 A. Yes.

22 Q. When did it first become a subject
23 of discussion?

24 A. I don't remember.

25 Q. Do you know approximately the year,

1 the month?

2 A. I don't remember.

3 Q. Okay.

4 MR. SHERMAN: I'd like to mark
5 this as Exhibit 2.

6 (Plaintiff's Exhibit 2:
7 Marked for identification - described in
8 index.)

9 BY MR. SHERMAN:

10 Q. Take a moment and look over this,
11 if you like.

12 A. (Witness complies.)

13 Q. Do you recognize this document?

14 A. Yes, I do.

15 Q. What is this document?

16 A. This is the declaratory ruling.

17 Q. Okay. Regarding teeth whitening?

18 A. Regarding teeth whitening.

19 Q. If you'll turn to the first page,
20 in the first sentence, it says, "On
21 September 8, 2010, the Connecticut State
22 Dental Commission, on its own motion,
23 initiated a declaratory ruling proceeding
24 regarding whether t-e-e-t-h whitening
25 practices and/or procedures constitute the

1 practice of dentistry," et cetera. That's a
2 correct statement?

3 A. Yes.

4 Q. Okay. What prompted the commission
5 to initiate the declaratory ruling process in
6 this case?

7 A. If I recall correctly, I believe
8 that members of the commission had heard some
9 information and stories and decided that the
10 commission should take a stand.

11 Q. Can you be more specific about the
12 type of information and stories that they
13 heard?

14 A. They weren't discussed.

15 Q. I'm sorry. Can you -- they weren't
16 discussed by the members of the commission?

17 A. The specifics.

18 Q. Okay. Had you heard any
19 information and stories?

20 A. I received two phone calls.

21 Q. From whom?

22 A. From -- from a dentist.

23 Q. Okay. Do you recall which dentist?

24 A. I do.

25 Q. Could you tell me who that is?

1 A. Dr. Gratovich.

2 Q. And he's a Connecticut licensed
3 dentist?

4 A. She's a licensed dentist in
5 Connecticut.

6 Q. Sorry. That was sexist of me. I
7 apologize.

8 A. No problem.

9 Q. But she is a Connecticut licensed
10 dentist?

11 A. Yes.

12 Q. Okay. What did Dr. Gratovich
13 relate to you in those phone calls?

14 A. Dr. Gratovich was worried about a
15 patient who was having her teeth whitened at
16 a salon and potential problems.

17 Q. Both the phone calls were about the
18 same patient?

19 A. One phone call was just a
20 procedural phone call.

21 Q. Okay. What do you mean by
22 "procedural" phone call?

23 A. What should she do.

24 Q. Okay. What should Dr. Gratovich do
25 or what should the patient do?

1 A. What should Dr. Gratovich do.

2 Q. Okay. What did you advise
3 Dr. Gratovich to do?

4 A. To call the Department of Public
5 Health.

6 Q. Do you know if Dr. Gratovich
7 followed your suggestion?

8 A. I don't know that.

9 Q. Do you know which teeth-whitening
10 business Dr. Gratovich's patient was going
11 to?

12 A. No.

13 Q. Did Dr. Gratovich communicate to
14 you that her patient had been harmed by teeth
15 whitening?

16 A. She did not communicate that to me.

17 Q. Okay. It was just more general
18 concern?

19 A. Yes.

20 Q. Okay.

21 What specific concerns did
22 Dr. Gratovich communicate, if any?

23 A. Dr. Gratovich was concerned of
24 potential harm.

25 Q. Did Dr. Gratovich indicate what

1 harm she was concerned about?

2 A. Burning tissues.

3 Q. Any other harms?

4 A. No.

5 Q. Other than the communication you
6 had with Dr. Gratovich, did you receive any
7 other information or stories about people
8 concerned about teeth whitening?

9 A. No.

10 Q. Okay. And you're aware other
11 members of the commission did, but they
12 didn't discuss those?

13 A. That's correct.

14 Q. Okay. Did the other members of the
15 commission indicate whether the information
16 and stories they received came from dentists?

17 A. I don't know that.

18 Q. Did a -- strike that.

19 No consumers of -- teeth whitening
20 consumers ever contacted you with concerns
21 about non-dentist teeth whitening, did they?

22 A. That's correct.

23 Q. Okay. Do you know if any consumers
24 contacted the other members of the
25 commission?

1 A. I don't know that.

2 Q. Do you know whether any of the
3 concerns that were expressed came from the
4 state dental association?

5 A. I don't know that.

6 Q. My understanding is that the
7 Connecticut State Dental Association is a
8 private organization and not a government
9 agency; is that correct?

10 A. Yes.

11 Q. Okay.

12 A. It's a not for profit.

13 Q. Okay. It's a professional trade
14 group?

15 A. It's a professional organization.

16 (Pause.)

17 A. It's not a trade group.

18 BY MR. SHAPIRO:

19 Q. Okay. Did any of the information
20 or stories that the commission received
21 indicate that any person had suffered
22 permanent harm as a result of teeth whitening
23 by a non-dentist?

24 A. I don't know that.

25 Q. Did any of the information or

1 stories indicate that any person had suffered
2 any harm?

3 A. I think the testimony -- in the
4 testimony of Dr. Myers, we heard that there
5 was.

6 Q. All right. Do you recall the
7 nature of that harm?

8 A. Burning tissues.

9 Q. Can you explain what you mean by
10 "burning tissues"?

11 A. Soft tissues harmed by the agents
12 applied without protective covering because
13 of a lack of protective covering.

14 Q. Would you characterize that as
15 permanent harm?

16 MR. SHAPIRO: I would object.
17 I think the question calls for speculation.
18 You can answer.

19 What -- you're asking in a
20 particular case?

21 MR. SHERMAN: I'm asking if --
22 BY MR. SHERMAN:

23 Q. Do you consider -- well --

24 A. I honestly don't know the answer to
25 that question.

1 Q. Okay. You do teeth whitening as
2 part of your dental practice?

3 A. Yes.

4 *Q. Would you describe the procedure
5 that you use?

6 MR. SHAPIRO: I would object.
7 It's irrelevant to the issues in the case at
8 hand. It's not potentially leading to
9 discoverable information about what this
10 particular dentist does in her personal
11 practice.

12 She's not being sued
13 individually. She's not being sued as an
14 individual dentist. She's a member of a
15 Commission that decided a case.

16 MR. SHERMAN: Well, I'm going
17 to ask you to limit speaking objections going
18 forward.

19 BY MR. SHERMAN:

20 Q. Do you understand the question?

21 A. Yes, but I understand the
22 objection.

23 MR. SHAPIRO: If the question
24 asks about her personal practice, I'm going
25 to instruct her not to answer the question.

1 BY MR. SHERMAN:

2 Q. Going back to the discussion of
3 soft tissue harm we were having a moment ago,
4 I believe you said there was concern that
5 teeth-whitening products could cause tissue
6 burning; is that correct?

7 A. That is correct.

8 Q. Okay. Do you recall whether any of
9 the stories or information that you received
10 about this particular concern -- strike that.

11 Since the passage of the
12 declaratory ruling, has the commission
13 received any more information or stories
14 about teeth whitening?

15 A. No.

16 Q. I'd like you to turn to page 5 of
17 the declaratory ruling, if you could.

18 The final sentence on this page,
19 which carries over to the following page,
20 could you read that to yourself, please.

21 A. (Witness complies.)

22 Q. It begins with "Applying the light
23 source."

24 A. (Deponent read document.)

25 Q. What does it mean to apply a light

1 source?

2 MR. SHAPIRO: I would object.
3 Dr. Strathearn has no authority to speak on
4 behalf of the commission with respect to the
5 meaning of declaratory ruling. She's a
6 member of a multimember commission.

7 BY MR. SHERMAN:

8 Q. Well, what's your understanding of
9 what it means?

10 A. I think --

11 MR. SHAPIRO: I would object.
12 It's irrelevant. It's irrelevant what her
13 understanding is. Are you asking her as an
14 individual dentist, as a member of the
15 public, as a member of the commission?

16 She can't speak for the
17 commission, and it's irrelevant what she
18 thinks it means as an individual.

19 BY MR. SHERMAN:

20 Q. How long have you been a dentist?

21 A. Twenty-six years.

22 Q. So is it the commission or the
23 position -- I'm sorry.

24 MR. SHERMAN: Is it the
25 position of the commission that the opinion

1 of the chair of the commission with 26 years
2 of experience as a dentist, with regard to
3 what it might mean to apply a light, is
4 irrelevant to the outcome of this lawsuit and
5 unlikely to produce discoverable information?

6 MR. SHAPIRO: Yes.

7 BY MR. SHERMAN:

8 Q. Why did the commission adopt this
9 declaratory ruling?

10 A. For protection of the public.

11 Q. Okay. How does this declaratory
12 ruling serve that purpose?

13 A. I think it speaks for itself.

14 MR. SHERMAN: Why don't we
15 take a ten-minute break.

16 A. Okay.

17 (Whereupon, a recess was
18 taken.)

19 BY MR. SHERMAN:

20 Q. We're almost done.

21 A. Okay.

22 Q. I just want to confirm a couple of
23 things before we wrap up.

24 A. Okay.

25 Q. So my understanding is that it is

1 the commission's position that you cannot
2 testify as to the meaning of the declaratory
3 ruling; is that correct?

4 A. Can you repeat the question?

5 Q. Sure. Earlier I asked you some
6 questions about the meaning of the
7 declaratory ruling --

8 A. Right.

9 Q. -- and Attorney Shapiro objected
10 and said that you're just one member of the
11 commission.

12 A. Right.

13 Q. So it's my understanding that the
14 commission's position is that you cannot
15 testify about the meaning of the declaratory
16 ruling; is that correct?

17 A. That's correct, the interpretation.

18 Q. Okay. And earlier we were talking
19 about concerns that people had expressed to
20 you about non-dentists doing teeth whitening,
21 and you mentioned that other members of the
22 commission had heard stories and information,
23 but you didn't know the substance of that?

24 A. That is correct.

25 Q. Okay. Could you have learned the

1 substance of those concerns by talking with
2 other members of the commission?

3 MR. SHAPIRO: I would object.
4 I don't understand the question.

5 Meaning could she have
6 investigated? Is that what you're asking?

7 MR. SHERMAN: Yes.

8 A. I suppose I could have.

9 BY MR. SHAPIRO:

10 Q. Okay. Do you have anything that
11 you want to add to the testimony that you've
12 given so far today?

13 A. I believe that the declaratory
14 ruling speaks for itself, and on a
15 case-by-case basis, it will be used by the
16 Dental Commission.

17 Q. Okay. And is there any testimony
18 that you've given that you want to correct or
19 that you think is incorrect?

20 A. Perhaps a couple of points may have
21 been clarified, but I don't believe I need to
22 correct anything.

23 Q. Okay. Is there anything that you
24 want to clarify before we conclude?

25 A. If the Department of Public Health

1 presents a consent order to the Dental
2 Commission and we rejected it, the department
3 has options on where they can proceed.

4 Q. What is a consent order?

5 A. The consent order is the
6 preliminary decision by the parties involved
7 that needs advice and consent by the Dental
8 Commission.

9 Q. Okay. Is that clarification in
10 reference to your earlier statement that the
11 Department of Health could choose to ignore
12 the commission's vote on a matter?

13 A. Yes, clarification.

14 Q. Okay. All right.

15 MR. SHERMAN: Before we
16 conclude, I want it noted for the record that
17 I think the information and stories that were
18 known to other members of the Dental
19 Commission fall within the scope of
20 paragraph 3 of the 30(b)(6) deposition, and I
21 believe that the commission's position on the
22 meaning of the declaratory ruling falls
23 within the scope of paragraph 4 of the
24 30(b)(6) notice.

25 We'll conclude this

1 deposition, but I will reserve the right to
2 seek more time with this witness on these
3 matters.

4 MR. SHAPIRO: Thank you.

5 MR. SHERMAN: Thank you very
6 much.

7 (Off the record discussion.)

8 (Whereupon, the witness was
9 excused at 10:40 a.m.)

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Jeanne Strathearn

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Subscribed and sworn to before me
on this __ day of _____, 2013.

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Notary Public

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My commission expires:

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1 CERTIFICATE

2
3 STATE OF CONNECTICUT)

4) SS.

5 COUNTY OF HARTFORD)

6 I, Jill K. Ruggieri, C.R.R., R.M.R.,
7 L.S.R. 506, a Notary Public duly commissioned
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11 January 4, 2013, at 9:32 a.m., at the Offices
12 of United Reporters, Inc., 90 Brainard Road,
13 Suite 103, Hartford, Connecticut, the
14 following-named person to wit: JEANNE
15 STRATHEARN, who was by me first duly sworn to
16 testify to the truth and nothing but the
17 truth of her knowledge touching and
18 concerning the matters in the controversy in
19 this cause; that she was thereupon carefully
20 examined upon her oath and her testimony
21 reduced to writing under my direction by
22 computer-aided transcription; that the
23 deposition is a true record given by the
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6 of any attorney or counsel employed by the
7 parties hereto or financially interested in
8 the action.

9 In witness whereof, I have hereunto set
10 my hand this ____ day of _____,
11 2013.

12
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16 _____
17 Jill K. Ruggieri, C.R.R.,
18 R.M.R., L.S.R. 506
19 Notary Public
20

21 My commission expires:
22 June 30, 2017
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I N D E X

DEPOSITION OF JEANNE STRATHEARN

EXAMINATION	Page
By Mr. Sherman	4

PLAINTIFF'S EXHIBITS

(For identification)

EXHIBIT	PAGE
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*Instructed not to answer:

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**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF CONNECTICUT**

SENSATIONAL SMILES LLC,
D/B/A SMILE BRIGHT,

Plaintiff,

Civil Action No.
3:11-CV-01787-MPS

v.

Date: April 22, 2014

DR. JEWEL MULLEN, ET AL.,

Defendants.

PLAINTIFF'S NOTICE OF APPEAL

In accordance with Rule 3 of the Federal Rules of Appellate Procedure, please take notice that Plaintiff Sensational Smiles LLC, D/B/A SmileBright, appeals to the United States Court of Appeals for the Second Circuit from the judgment in this case entered on March 31, 2014, denying Plaintiff's Motion for Summary Judgment and granting Defendants' Motion for Summary Judgment.

Respectfully submitted,

Institute for Justice

/s/ Paul M. Sherman

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on April 22, 2014, a true and correct copy of the foregoing
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